

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

Barrier West, Inc.

Employer

and

Case 19-RC-15300

International Association of Machinists and
Aerospace Workers, District Lodge W-1

Petitioner

**REGIONAL DIRECTOR'S REPORT AND
RECOMMENDATION ON OBJECTION**

On April 27, 2010,¹ I approved a Stipulated Election Agreement (Agreement) in this matter. On May 24, a Board Agent conducted a secret ballot election in accordance with the Agreement's terms. The employees who were eligible to vote in the election included:

All full-time and regular part-time woods drivers, paper drivers, highway drivers, yard truck drivers, low bed drivers, equipment operators, laborers and maintenance employees employed by the Employer at or out of its Aberdeen, Washington facility; excluding all other employees, office clerical employees, confidential employees, managerial employees, and guards and supervisors as defined in the Act.

When the voting was over, the Board Agent prepared a Tally of Ballots and served the parties with a copy. The Tally listed the following results:

Approximate number of eligible voters	26
Void ballots	0
Votes cast for Petitioner	13
Votes cast against participating labor organization	12
Valid votes counted.....	25
Challenged ballots	0
Valid votes counted plus challenged ballots.....	25

¹ All dates hereinafter are in 2010 unless otherwise specified.

On May 28 the Employer filed one timely objection to the election and to conduct affecting the election results. Copies of the Employer's objection were served upon the other parties. The objection is attached and incorporated as part of this Report.

Pursuant to the terms of the Stipulated Election Agreement and pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned Regional Director caused an investigation to be made of the objection to the election. As set forth below, I find that the objection does not warrant setting aside the election.

OBJECTION

The Employer's objection alleges that one employee, Daniel Alderman, through no fault of his own, was prohibited from voting in the election due to hospitalization in Seattle, Washington as a result of a heart attack on May 15, and a subsequent stroke. Pursuant to the Stipulated Election Agreement, the election occurred on May 24 from 12 noon to 5:00 p.m. at the Employer's facility in Aberdeen, Washington. As the Employer explains, during a visit to Alderman in the hospital by Operations Manager Jeff Miller on May 23, Miller learned that Alderman desired to participate in the election, scheduled for the following day. On the morning of the election Miller contacted the Employer's Treasurer and Secretary, George Donovan, concerning the issue, who in turn referred the matter to counsel for the Employer. When the Employer's counsel contacted the Board and asked a Board Agent if there was any way for Alderman to vote, he was told by the Board Agent that Board policy was to not allow absentee ballots. The Board Agent declined to make an exception to the rule concerning absentee voting and thus Alderman was the only individual among the 26 eligible voters who did not vote.

DISCUSSION

Based on a careful review of the evidence as recited by the Employer, and relevant Board precedent, I find that Alderman's inability to vote does not constitute objectionable conduct that warrants setting aside the election.

The Board has long accepted general responsibility for establishing a procedure for the conduct of its elections which gives all eligible employees an opportunity to vote, *Yerges Van Liners*, 162 NLRB 1259 (1967). The Board does not, however, assume responsibility for employees who are unable to vote due to factors outside of the control of the parties to an election. For instance, in *Versail Manufacturing, Inc.*, 212 NLRB 592 (1974) the Board refused to set aside an election where an employee, whose vote may have been determinative, was prevented from voting when his vehicle was stolen while he was returning to the employer's facility. As the Board reasoned, "the fact that required the *Yerges* election to be set aside was that the employee was caused to miss the election by the Employer, a party to the proceeding. The same protective policy would be applicable if the petitioning union, or the Board itself, prevented an eligible employee from voting. It would be inapplicable, of course, if the crucial employee was prevented from voting by reason of sickness or some other unplanned occurrence beyond the control of the parties, the Board, or the employees," *Versail Manufacturing* at 593. Further, in determining whether to set aside an election based on an eligible voter's inability to exercise the right to vote, the burden is on the objecting party to come forward with evidence of party causation in support of its objection, *Sahuaro Petroleum and Asphalt Company*, 306 NLRB 586, 587 (1992) (election upheld where the objecting union failed to produce evidence showing that an employee's late return from his route and subsequent failure to vote was attributable to the employer).

In the instant case, there is no argument that Alderman was unable to vote for any reason other than his hospitalization, a factor undoubtedly outside of the control of the parties to the election. Certainly Alderman's situation is unfortunate and regrettable. This, circumstance, however, does not make his inability to appear at the election site during polling hours for the purposes of voting objectionable when there is no evidence, or even argument, that his absence was related to conduct on the part of the Union, the Employer or the Board.

The Employer also implicitly suggests that some alternate arrangements should have been made in order to permit Alderman to vote, citing *Lemco Construction, Inc.*, 283 NLRB 459 (1987) as standing for the proposition that where an eligible employee was not afforded an adequate opportunity to vote, the Board should decline to issue a certification and direct a second election. First, I note that the analysis of *Lemco Construction* is inapposite to the instant situation. In *Lemco*, the Board dealt with the question of whether to set aside an election when only one of eight eligible voters cast a ballot. In determining whether such low turnout necessitated a new election, the Board reversed previous decisions focusing on whether a “representative” complement of employees voted, and instead held that new elections would not be ordered, solely due to low voter participation. With 25 of 26 eligible employees voting here, there is no sound argument that this election should be overturned on such grounds. Moreover, *Lemco* supports the principle that certifications of an election are appropriate when “employees are not prevented from voting by the conduct of a party or by unfairness in the scheduling or mechanics of the election,” *Lemco Construction* at 460.

To the extent that the Employer argues that alternative arrangements should have been made to permit Alderman to vote, following the Employer’s notification to the Region of Alderman’s condition only hours before the election was scheduled to begin, I note that Section 11302.4 of the Board’s Representation Casehandling Manual provides that “the Board does not provide absentee ballots. Specifically, ballots for voting by mail should not be provided to, inter alia, those who are in the Armed Forces, ill at home or in a hospital, on vacation, or on leave of absence due to their own decision or condition.” [Emphasis added.] This policy was upheld by the Third Circuit in *NLRB v. Cedar Tree Press, Inc.*, 169 F.3d 794 (1999) where the Court rejected an employer’s argument that the election in which the union received a majority of the valid votes cast, should be overruled as the Board refused to send an absentee ballot to an employee on vacation. While I recognize the fact that the employee in *NLRB v. Cedar Tree*

Press, supra, was unable to attend the election in question as he was on vacation while employee Alderman in the instant case was hospitalized, this distinction is not determinative as under Board policy both are accorded the same status. Furthermore, although the Employer equates the failure to create alternate voting arrangements for Alderman with disability discrimination, the Employer presents no evidence that would indicate that Alderman's failure to vote was the result of non-compliance by the Region with the disability accommodation provisions of the Representation Casehandling Manual² or of the Accommodation provisions contained in Section 4 of the Stipulated Election Agreement.³

Finally, the Board has long held that election agreements are "contracts" binding on the parties that executed them, *Barcelona Shoe Corp.*, 171 NLRB 1333 (1968) and, as such, it will set aside an election where a material term of the agreement has been breached. In *KCRA-TV*, 207 NLRB 1288 (1984) for example, the Board ordered a new election where, in the context of a mixed manual/mail ballot election, the Region mailed ballots to two employees even though under the agreement both were to vote in the manual portion of the election. The terms of the Stipulated Election Agreement in this case, signed by both the Employer and Union, provided for a manual election to occur from 12:00 noon to 5:00 p.m. on May 24 at the Employer's facility in Aberdeen, Washington. No provision was made for balloting by mail or otherwise. Consequently, if Alderman had been provided with a mail ballot on the day of the manual election, or in some other way permitted to vote in a manner not contemplated by the Stipulated Election Agreement, any such arrangement could be grounds for setting aside the election due

² See, for instance, Section 13202 of the Manual.

³ With respect to the disability accommodation clause of the Stipulated Election Agreement, I note that not only did the Employer contact the Region concerning Alderman only hours before the election was scheduled to begin, hardly the advance notice requested in Section 4, but also the location of the polling place in Aberdeen, Washington is at least a two hour drive from the Seattle hospital at which Alderman was a patient, thus further rendering any potential alternate voting arrangement for Alderman, even if such were appropriate, to be problematic. Moreover, the thrust of the accommodation clause appears to address accommodations at the site of the election, a consideration not apparently applicable in these circumstances.

to a breach of a material term of the agreement, a result inconsistent with my obligations under the Act.

CONCLUSION

Based on the above precedent, and accepting the facts as presented by the Employer, I recommend that the Employer's objection be overruled in its entirety. Because I am recommending that the Employer's objection be overruled, I further recommend that a Certification of Representative issue.

RIGHT TO FILE EXCEPTIONS

As provided in Section 102.69 of the Board's Rules and Regulations, any party may, within fourteen (14) days from the date of the issuance of this Report, file with the Board in Washington, D.C., eight (8) copies of exceptions to such Report together with a supporting brief, if desired. A copy of such exceptions, if filed, must be timely served upon the other parties and upon the Regional Director.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board website: www.nlrb.gov. On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits which a party has submitted to the Regional Director in support of its objections and which are not included in the Report are not part of the record before the Board

unless appended to the exceptions or opposition thereto which the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.

DATED at Seattle, Washington on the 25th day of June, 2010.

Richard L. Ahearn, Regional Director
National Labor Relations Board, Region 19
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